

**(2000) 01 RAJ CK 0025**

**In the Rajasthan High Court**

**Case No :** Civil Restoration Application No. 145 of 1990

Santosh Kumar Jain

APPELLANT

Vs

Firm Suganchand Radhey Shyam and Others

RESPONDENT

**Date of Decision :** 07-01-2000

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 17, Order 41 Rule 19

**Citation :** AIR 2000 Raj 226 : (2000) 3 RLW 1711 : (2000) 4 WLC 111

**Hon'ble Judges :** Arun Madan, J

**Bench :** Single Bench

**Advocate :** Sudesh Bansal, for the Appellant; Mahendra Shah, for the Respondent

**Final Decision :** Dismissed

## Judgement

Arun Madan, J.—By this application No. 145/ 90 filed under Order 41 Rule 17 & 19, CPC, applicant Santosh Kumar Jain (defendant appellant) prayed for recalling judgment dated 12-11-90 passed by another bench of this Court in S.B. Civil First Appeal No. 7/82 for short CFA No. 7/82).

2. This Court by its judgment dated 12-11-90 decided on merits and partly allowed aforesaid CFA No. 7/82 directing that the plaintiff is entitled to recover Rs. 39,554.11p. (as disclosed in Exh. 20) with interest @ 12% p.a. from 4-8-69 Bill payment from the defendant. This Court considered relevant pleadings, evidence of the parties and also the impugned judgment dt. 28-5-81 passed in Civil Suit No. 60/79 (2/72) by the Additional District Judge No. 1, Jaipur City. Jaipur against-which aforesaid CFA No. 7/ 82 was preferred. However, this Court by 63 judgment decided aforesaid CFA No. 7/82 in the absence of the learned counsel for both the parties. Hence this restoration application.

3. The contention of Shri Sudesh Bansal, learned counsel for the applicant is that when the case was listed for hearing at S.No. 35 on 12-11-90 before Hon. Mr. S. N. Bhargava J., it was transferred to another bench of Hon. Mr. D. L. Mehta, J. on

the same day while aforesaid CFA No. 7/82 was decided on merits in absence of applicant's counsel namely Mr. Arun Kumar Bhandari, who was not aware of the case having been transferred to another Bench and that it was only when he was informed by Mr. Abhay Kumar Bhandari, Advocate at 12 noon that his client's case has been decided by the Bench of Hon. Mr. D. L. Mehata, J. On the basis of aforesaid facts, Shri Bansal contended that absence of applicant's counsel Shri Arun Bhandari on 12-11-90 was bona fide and not deliberate.

4. On the other hand, refuting the contentions of the applicant, Shri M. K. Shah, learned counsel for the plaintiffs respondents contended that even if aforesaid restoration application was filed, nothing prevented the applicant defendant to have preferred an appeal against the judgment dated 12-11-90 deciding first appeal on merits in absence of the counsel, and it is not in dispute that no appeal has been preferred against the judgment dt. 12-11-90 on merits, inasmuch as decretal amount has already been paid in decree dt. 25-2-99 drawn by the subordinate Court on the basis of compromise arrived at between the parties in execution petition and no relief has been claimed against respondent Nos. 1 and 2, and in this view of the matter, this application has also become infructuous.

5. I have heard the learned counsel for the parties and considered their contentions as well as legal position on the subject. Order 41, Rule 17 and 19 CPC read as under :--

"Rule 17 dismissal of appeal for appellant's default.-- (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing the Court may make an order that the appeal be dismissed.

(Explanation.-- Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.

(2) Hearing appeal ex parte.-- Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte.

Rule 19. Re-admission of appeal dismissed for default.-- Where an appeal is dismissed under Rule 11, Sub-rule (2), or Rule 17 or Rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit."

6. As would be evident from a careful reading of Rule 17 of Order 41, CPC, it relates to dismissal of appeal for appellant's default and its Sub-rule (1) deals with dismissal in default. Explanation to Sub-rule (1) was added making it more explicit that dismissal of an appeal on the merits would not be permissible. Similarly, Rule 19 of Order 41, CPC deals with readmission of appeal dismissed for default and as per provisions envisaged therein, in case of an appeal being

dismissed in default under Rule 11, Sub-rule (2) or Rule 17 or Rule 18, the appellant may apply for readmission of the appeal and readmission of such dismissed appeal is permissible only if it is proved that the appellant was prevented by any sufficient cause from appearing when the appeal was called on for hearing. Thus viewed, for readmission of an appeal having been dismissed under Rule 11 or 17 or 18 CPC., the appellant seeking readmission of his dismissed appeal must establish sufficient cause on record which prevented him from appearing when the appeal was called on for hearing.

7. In my considered view, the present case being not a case of dismissal of appeal for appellant's default or for non-prosecution but is a case where appellant's appeal (CFANo. 7/82) was partly allowed modifying the judgment of the trial Court to the extent stated therein, after giving reasoned judgment and considering the merits, against which the appellant (applicant) was well within his right to prefer appeal before the appellate Court, which remedy he did not avail of, for the reasons best known to him. Now at this stage, it will neither be desirable nor appropriate for this Court to recall the judgment of partly allowing the appeal on merits, inasmuch as the learned counsel for the appellant has failed to establish sufficient cause which prevented from appearing when the appeal was called on for hearing.

8. In support of his contentions, Shrt Bansal cited the following cases :--

- 1) Emmanuel Simon Peters Vs. Alice Peters and Another,
- 2) Shantilal Chandra Shankar v. Bai Basi AIR 1976 Guj 1
- 3) Sudhangshu Mohan Dutta Vs. Smt. Bela Rani Paul,
- 4) Deo Dutta Singh and Others Vs. Ram Naresh Singh and Others,
- 5) Rafiq and Another Vs. Munshilal and Another,

9. I have examined the ratio of decisions cited by Shri Bansal and without disputing the principles of law laid down therein but the facts and circumstances of those cited cases being different than in present one on the subject and different causes shown by the respective parties and found by the Courts as sufficient therein, in my considered view, those decisions (supra) do not help and apply to the present case.

10. The applicant has failed to produce any document to establish that on 12-11-90 when the appeal was though listed before another Bench but transferred to the bench which partly allowed the appeal deciding on merits though in absence of appellant's counsel. No affidavit of Shri Abhay Kumar Bhandari has been filed to substantiate the case of Shri Arun Bhandari that after transfer of the cases from one Bench to another Bench. Mr. Abhay Kumar Bhandari informed him of the appeal of his client being decided by the Court. Only cause stated by Shri Arun Bhandari for his absence on 12-11-90 when applicant's appeal was called on for hearing, is that he was not aware of the fact

of the case being transferred from one Bench to another. It being not sufficient cause in my view. I do not think it just to invoke Rule 19 of Order 41 CPC by recalling a judgment of deciding on merits and of partly allowing the appeal of the appellant, so also keeping in view the peculiar facts and circumstances of the case, namely: (1) that in execution of the decree dt. 25-2-99 on the basis of the compromise having been arrived at between the parties, in execution petition, the decretal amount has already been paid by Santosh Kumar Jain as would be evident from order dt. 25-2-99 of the ADJ Banrlikul and no relief has been claimed against respondent Nos. 1 and 2, which has rendered this application of restoration as infructuous; (2) that this restoration application No. 145/90 was also once dismissed for non-prosecution on 23-11-98 and which was restored on 21-5-99 in another restoration application No, 118/99, and (3) that it is a peculiar case where this Court issued notice on this restoration application No. 145/90 by its order dated 9-1-91 but the steps taken by appellant's counsel shows that about eight years have been taken for prosecution of getting service of the notice effected on the respondents on or about July, 1999 after persistent chances being given by this Court, during which compromise was arrived at between the parties in execution proceedings.

11. As a result of the above discussion, this restoration application No. 145/90 must fail and is hereby dismissed. No order as to costs.